Supreme Court, U. S.
FILED
MAY 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1535

CURVIN J. TRONE, JR., Trustee for Westgate-California Corporation, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States: Your Petitioners, Curvin J. Trone, et al., respectfully pray for a Writ of Certiorari to the United States Court of Claims to review an order entered February 4, 1977, by said court granting defendant's motion for summary judgment.

OPINION BELOW

The order of the Court of Claims granting the defendant's motion for summary judgment and dismissing the plaintiffs' petition is set forth in the Appendix, *infra*, at p. 1a.

JURISDICTION TO REVIEW

The date of the order sought to be reviewed is February 4, 1977. The jurisdiction of this Court is invoked under Section 1255 of Title 28, United States Code.

QUESTION PRESENTED

When the Comptroller of the Currency, acting lawfully and secretly under the National Bank Act, has forced a faithless employee of a corporation to transfer valuable property to a national bank, and when the forced transfer is alleged to be a taking without compensation, is it error for the Court of Claims to render summary judgment for the defendant on the ground that the plaintiff corporation is "tainted" by acts of its faithless employee, when the innocence of the corporation has been neither decided nor put in issue?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States is set forth in the Appendix, *infra* at p. 6a. Pertinent provisions of the National Bank Act (12 U.S.C. §§ 191, 203, 481, 1818 (b) - (g)) are set forth in the Appendix, *infra*, at p. 6a. The pertinent part of 28 U.S.C. § 1491 is set forth in the Appendix, *infra*, at p. 20a.

STATEMENT

Petitioners are the Trustee and Additional Trustee for the Estate of Westgate-California Corporation ("Westgate-California"), a publicly held company which is seeking reorganization under Chapter X of the Federal Bankruptcy Act, 11 U.S.C. § 1 *et seq*. The Trustees are responsible, subject to the supervision of the United States District Court for the Southern District of California, for administering the affairs of Westgate-California. Westgate-California is a holding company with numerous subsidiaries, some of which have been disposed of since the inception of the Chapter X proceedings, and many of which are themselves subject to proceedings under the Bankruptcy Act (hereinafter, Westgate-California and its subsidiaries, as of the inception of its Chapter X proceedings, are referred to collectively as "the Westgate Corporations"). Prior to November 1973, a principal officer of Westgate-California was C. Arnholt Smith (hereinafter "Smith"). Smith owned or controlled about one-half of the stock of Westgate-California. Smith exercised control over the affairs of the Westgate Corporations. At the same time, Smith was a principal officer of and exercised control over the United States National Bank, located in San Diego, California (hereinafter called "the Bank"). The Bank was a national banking association under the regulatory supervision of the Comptroller of the Currency (hereinafter called "the Comptroller"), pursuant to the National Bank Act. 12 U.S.C. § 1 *et seq*. Smith owned less than one-half of the Bank's stock, the rest being publicly held by other persons.

In May 1973, the Comptroller, having reason to believe that the Bank was in serious financial difficulty

and that the Bank was holding a large portfolio of loans made to Smith-related entities, undertook a program to force Smith to transfer valuable assets of the Westgate Corporations to the Bank, and to impose financial obligations running to the Bank from the Westgate Corporations. The Comptroller acted in secret, by invoking and threatening to invoke powers conferred on him by the National Bank Act, 12 U.S.C. §§ 191, 203, 481, 1818(b)-(g), in an effort to avoid a nasty public reaction which might make it difficult or impossible to preserve the Bank as a going concern. The Comptroller was able to enhance the assets of the Bank substantially at the expense of the Westgate Corporations.

The lynch-pin of the Comptroller's program was a secret cease and desist order consented to by Smith, under which Smith was obliged to indemnify the Bank for any losses sustained by the Bank as a result of any loans to any Smith-related entity, including the Westgate Corporations. A more effective method to force Smith to favor the Bank to the exclusion of the interests of the unknowing Westgate Corporations' creditors and shareholders would be hard to imagine.

The Comptroller's order necessarily could not select among the various loans from the Bank to the Westgate Corporations. Therefore, Smith was both enabled and required to call loans made to the Westgate Corporations, where the monies lent had been corruptly diverted by Smith for his own use and where in many instances the existence of the loans were unknown to anyone in the Westgate Corporations other than Smith and his confederates.

The Comptroller's efforts to save the Bank at the expense of the Westgate Corporations' shareholders

and creditors ultimately failed. On October 18, 1973, the Comptroller officially declared the Bank insolvent and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver. The FDIC promptly sold a package of the Bank's "clean" assets to Crocker National Bank.

In the course of the Westgate Corporations' bankruptcy proceedings which followed the appointment of a receiver for the Bank, the Petitioners discovered that as a result of the Comptroller's secret order against Smith and the related secret exercise of bank supervision, Smith had transferred valuable assets of the Westgate Corporations to the Bank and imposed obligations on the Westgate Corporations running to the Bank, with the aid of fraudulent documentation and fictitious accounting entries.

Petitioners have brought proceedings against Smith and his confederates in an effort to recover damages resulting from his malversation of their funds and related breaches of trust. In addition, in the bankruptcy proceedings, Smith's controlling block of Westgate-California stocks has been subordinated to the claims of all other creditors and shareholders. Moreover, the Trustees have sought the subordination of claims and stock interests of various persons and entities whom the Trustees believe acted in concert with Smith.

The Petitioners brought an action in the Court of Claims under 28 U.S.C. § 1491, which sought damages resulting from the taking of the Westgate Corporations' property by reason of the Comptroller's lawful exercise of regulatory powers to enhance the financial position of the Bank. The Court of Claims acknowledged that an unconstitutional taking may occur by

way of the lawful exercise of regulatory power, citing *Pennsylvania Coal Co.* v. *Mahon,* 200 U.S. 393 (1922); *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958); and *Benenson* v. *United States,* Ct. Cl. No. 368-75, decided January 26, 1977. The Court of Claims nonetheless granted the defendant's motion for summary judgment holding that no taking could have occurred in the context of the facts alleged in the Complaint herein. The Court of Claims reasoned that the Comptroller had forced Smith to cause plaintiffs to give up assets fraudulently obtained by Smith through his use of the "improper preferential position" the Westgate Corporations had *vis à vis* the Bank. The court made plain that it thought plaintiffs were seeking compensation to restore the benefits of business relations with the Bank which were "tainted" or "improper".

The Court of Claims erred. Whether the transactions between the Bank and the Westgate Corporations were lawful or not, or proper or not, was not at issue. The defendant has not filed an answer to put them in issue. In addition, if lawfulness or propriety had been put at issue, they have not been resolved, because the case was decided below without the benefit of any evidence regarding the innocence of the Westgate Corporations.

REASONS FOR GRANTING THE WRIT

It was error to give defendant summary judgment on the issue of the propriety of transactions between the Westgate Corporations and the Bank.

The defendant has filed no answer and no affidavits in support of its motion for summary judgment. There

is no evidence of record to support a judgment that transactions between the Bank and the Westgate Corporations resulted from improper action by the Westgate Corporations. The record shows that Petitioners aver that Smith was a faithless employee of the Westgate Corporations, whose improper actions for his own benefit injured the innocent shareholders and creditors of the Westgate Corporations.

The Court of Claims must have assumed that the faithless acts of Smith are chargeable to the Westgate Corporations because without that assumption the court could not have had a basis to deny the Westgate Corporations a right to show that the United States took their property by forcing Smith secretly to transfer it to the Bank. The Court of Claims should not have made that assumption. This is not a case where a third party is suing a principal for having relied on the apparent authority of its agent.

The instant case involves no claim of reliance by the United States, to its detriment or not, on any authority or apparent authority from the Westgate Corporations to Smith. The United States does not assert that in ordering Smith to transfer the Westgate Corporations' assets to the Bank, it selected only those assets which it thought had been improperly procured from the Bank.

Insofar as the United States was concerned, the Bank's enrichment at the expense of the Westgate Corporations was without regard to the innocence of the Westgate Corporations. The object was to save the Bank. That was an authorized object, and it was achieved by authorized means. But it was achieved at the expense of shareholders and creditors of the West-

gate Corporations who were, by reason of summary judgment, denied the right to prove their innocence.

If this were a proceeding by the Westgate Corporations against Smith to recover against him for his breach of trust, the parties would be entitled to a trial on the issue of whether a breach of trust occurred. *Wells Truckways, Limited* v. *Burch*, 247 F.2d 194 (10th Cir. 1957); *Jack's Cookie Co.* v. *Brooks*, 227 F.2d 935, 939 (4th Cir. 1955); *Winget* v. *Rockwood*, 69 F.2d 326 (8th Cir. 1934). The Petitioners are no less entitled to have a fair trial of the fact of breach of trust here, where the defendant is not an innocent third party claiming reliance on an appearance of authority. In fact, the defendant has used the faithless employee as its instrument of secret regulation to save the Bank without regard to the rights of others.

The Court of Claims therefore erred in equating the Westgate Corporations with Smith so as to deprive them of a right to prove that they were not the beneficiaries, but the victims, of Smith's corrupt use of his positions of trust. The decision below should be reversed and the case remanded for trial of the issues of fact.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Order of the United States District Court for the Central District of California.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 135-75

CURVIN J. TRONE, JR., Trustee for Westgate-California Corp., etc., et al.

v.

THE UNITED STATES

Before DAVIS, *Judge,* Presiding and KASHIWA, *Judge.*

Order

This case comes before the court on defendant's motion for summary judgment founded on the grounds that no claim is stated which is within this court's jurisdiction and that the petition fails to state any claim upon which relief may be granted. Oral argument has been had and the court has considered the briefs and exhibits of the parties.

Plaintiffs are (1) trustees in bankruptcy appointed for several corporations (including Westgate-California Corporation) which formed part of C. Arnholt Smith's financial empire, and (2) several corporations subsidiary either to Westgate-California or to subsidiaries of Westgate-California.[1] The gist of their claim is that the United States took property of theirs, without paying just compensation, by virtue of actions required to be taken by them (through C. Arnholt Smith as intermediary) in connection with the difficulties of the United States National Bank of San Diego (the Bank) which likewise was a component of Smith's financial empire and was likewise controlled by him. In October 1973 the Comptroller of the Currency declared the Bank to be insolvent; the Federal Deposit Insurance Corporation (FDIC) was duly appointed

[1] For convenience we shall sometimes refer collectively to the trustees and the suing corporations as "the plaintiff companies."

receiver. Before that time the Bank, at Smith's instance, had made loans and had other transactions, directly or indirectly, with the plaintiff companies. Without going into the complex details, we take the pith of the present claim to be that, both before and for some time after the open declaration of insolvency, the Comptroller and other federal agencies put pressure on Smith (in his capacity as chief owner of the Bank) to take action with respect to these companies (which he also controlled) which caused them to incur losses, directly or indirectly, with respect to dealings with the Bank, *i.e.*, caused them to pay debts owed the Bank sooner than anticipated, caused them to give the Bank allegedly low rental rates, caused the Bank to refuse further loans or extensions of credit to them, caused the Bank to require security for unsecured or improper secured loans, caused the Bank to preserve and protect its interest in collateral securing loans involving the plaintiff companies, etc.

In the first of their papers filed with this court, plaintiffs seemed to assert that the Comptroller and other federal agencies had acted wrongfully, negligently and in abuse of their power and discretion in taking the various actions now complained of by the plaintiff companies. Such claims sound in tort and would clearly be outside our jurisdiction. *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967). However, plaintiffs have since made it perfectly clear that they do not challenge the propriety of any of the actions taken by these federal officials in connection with their regulation of and control over the Bank. Rather, plaintiffs' sole claim is that these actions, though deemed for the purposes of this case to be wholly authorized and proper conduct in trying to protect and preserve the operations and assets of the Bank, nevertheless constituted a taking of the property of the complaining Smith-dominated companies.[2]

[2] *I.e.*, *formerly* Smith dominated.

This being the current posture of the case, we must uphold defendant's contention that plaintiffs have failed to state a viable claim for a taking requiring the payment of just compensation. As the case comes to the court, what we have before us is (a) a history of a C. Arnholt Smith, as dominator of the Bank, causing that financial institution, before its difficulties brought the Comptroller of the Currency into the picture, to make improper, unsafe, and unsecured loans to several of the plaintiff companies (which he also dominated) and to give them unjustified preferential treatment—coupled with (b) an appropriate effort by the Comptroller of the Currency and by other federal agencies (once they intervened) to rectify that situation by refusing thereafter to make such improper or unsafe loans or to grant extensions of credit, and also by putting pressure on Smith to cause plaintiff companies to give proper security, or to repay improper, unsafe, or unsecured loans, or otherwise to compel plaintiff companies to give up the improper advantages they had obtained from the Bank through Smith. This amounts to no more than customary regulation by the banking authorities of a troubled bank in an attempt to put its affairs in correct order and to undo and untangle prior actions of the Bank which should not have been undertaken. The United States did not get any of the assets of the plaintiff companies for itself [3] nor did it receive any benefit other than through the potential improvement of the banking system in the attempt to save the United States National Bank. The Government simply caused the plaintiff companies to do what they should have been required to do by a properly-run Bank.

Sometimes governmental regulation is so drastic that a constitutional taking necessarily results. *See, e.g., Penn-*

[3] Insofar as the FDIC, as receiver of the Bank, may have received assets and property on behalf of the Bank for which the plaintiff companies had a claim, they do not pursue such claims in the present litigation. They have for the most part settled and released their claims against FDIC.

sylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Benenson* v. *United States*, Ct. Cl. No. 368-75, decided January 26, 1977. But this is clearly not such a case. The actions taken and directed by the Comptroller of the Currency and the other federal officials fell well within the ambit of conventional bank regulation by governmental authorities. *Cf. Eastport Steamship Corp.* v. *United States*, *supra*, 178 Ct. Cl. 599, 612, 372 F.2d 1002, 1011-12 (1967). Insofar as plaintiff companies were caused to give up property or assets, that was a direct result of the improper preferential position, *vis-à-vis* the Bank, the main plaintiff companies had previously obtained through the intervention of C. Arnholt Smith whose confiict-of-interest spot had enabled and caused them to receive undue advantages to which they were not entitled. Plaintiffs wish to appear now as if they were wholly innocent at all the relevant times —free of and separate from the Smith taint. That is of course not true. In regulating the Bank's operations, the federal officials had the right to consider plaintiff companies as having been placed in their unfair preferential position by Smith, who dominated and controlled them as well as the Bank, and these officers had the right to try to rectify those improper advantages by requiring the companies, through Smith, to put themselves in the correct stance *vis-à-vis* the Bank. If Smith's manipulations in obtaining improper preferences for the companies caused injury to them (or their affiliates) in the long run, plaintiffs may well have a claim against Smith. They cannot, however, shift that demand to the Government which they concede acted lawfully and properly in moving to neutralize, so far as the Bank was concerned, the unfortunate and preferential results of the Smith conflict-of-interest taint.

We have ruled that the United States cannot be held liable under the Tucker Act for commercial injuries resulting from a failure or wrong in the course of the normal regulatory process. *Eastport Steamship Corp.* v. *United States*,

supra, 178 Ct. Cl. 599, 608-11, 372 F.2d 1002, 1009-1011 (1967). *A fortiori* the same principle must apply when the federal officials have committed no such wrong in the regulatory process but have merely tried to redress failures or improper activity by business entities through compulsion on those persons to comply with the proper standards.

The *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-56 (1974), on which plaintiffs rely, were quite different. There the statute provided for the compulsory transfer under a Final System Plan to Consolidated Rail Corporation (in return for Conrail securities and other obligations and benefits) of designated rail properties by certain railroads in reorganization ("conveyance taking"), and also mandated that these companies remain in operation, at a loss if need be, to the extent necessary for these assets to be available for transfer ("erosion taking"). These actions required by the Reorganization Act (*i.e.* forcing the claimant to hand over its assets to another entity at what might be less than constitutionally-required fair value, and compelling a company to stay in business even though it continued to suffer large losses) lie in the traditional mold of potential eminent domain takings of private property—not in the pattern, as here, of governmental regulation correcting and redressing substandard and improper activities by private persons which have hurt others (here the Bank, its depositors, and its other creditors). Plaintiff companies are not like the railroads affected by the Regional Rail Reorganization Act; rather, they are like persons who have gained from a fraud and who are then obliged to disgorge their improper benefits.

It Is Therefore Ordered and Concluded that defendant's motion for summary judgment is granted and the petition is dismissed.

By the Court

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Constitutional and Statutory Provisions

Amendment V of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following are pertinent provisions of the National Bank Act, 12 U.S.C. § 1, *et seq.* (1971):

§ 191

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association.

§ 203

Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of

the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security as the Comptroller of the Currency deems proper. The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of sections 201 to 211 of this title, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of sections 201 to 211 of this title, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien. The conservator shall receive as salary an amount no greater than that paid to employees of the Federal Government for similar services. (Mar. 9, 1933, ch. 1, title II, 9203, 48 Stat. 2.)

§ 481

The Comptroller of the Currency, with the approval of the Secretaary of the Treasury, shall appoint examiners who shall examine every national bank twice in each calendar year, but the Comptroller, in the exercise of his discretion, may waive one such examination or cause such examinations to be made more frequently if considered necessary. The waiver of one such examination as above pro-

vided shall not be exercised more frequently than once during any two-year period. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided*, That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title. The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

The examiner making the examination of any affiliate of a national bank shall have power to make a thorough examination of all the affairs of the affiliate, and in doing so he shall have power to administer oaths and to examine any of the officers, directors,

employees, and agents thereof under oath and to make a report of his findings to the Comptroller of the Currency. The expense of examinations of such affiliates may be assessed by the Comptroller of the Currency upon the affiliates examined in proportion to assets or resources held by the affiliates upon the dates of examination of the various affiliates. If any such affiliate shall refuse to pay such expenses or shall fail to do so within sixty days after the date of such assessment, then such expenses may be assessed against the affiliated national bank and, when so assessed, shall be paid by such national bank: *Provided, however*, That , if the affiliation is with two or more national banks, such expenses may be assessed against, and collected from, any or all of such national banks in such proportions as the Comptroller of the Currency may prescribe. The examiners and assistant examiners making the examinations of national banking associations and affiliates thereof herein provided for and the chief examiners, reviewing examiners and other persons whose services may be required in connection with such examinations or the reports thereof, shall be employed by the Comptroller of the Currency with the approval of the Secretary of the Treasury; the employment and compensation of examiners, chief examiners, reviewing examiners, assistant examiners, and of the other employees of the office of the Comptroller of the Currency whose compensation is and shall be paid from assessments on banks or affiliates thereof shall be without regard to the provisions of other laws applicable to officers or employees of the United States. The funds derived from such assessments may be deposited by the Comptroller of the Currency in accordance with the provisions of section 192 of this title and shall not be construed to be Government funds or appropriated monies; and the Comptroller of the Currency is

authorized and empowered to prescribe regulations governing the computation and assessment of the expenses of examinations herein provided for and the collection of such assessments from the banks and/or affiliates examined. If any affiliate of a national bank shall refuse to permit an examiner to make an examination of the affiliate or shall refuse to give any information required in the course of any such examination, the national bank with which it is affiliated shall be subject to a penalty of not more than $100 for each day that any such refusal shall continue. Such penalty may be assessed by the Comptroller of the Currency and collected in the same manner as expenses of examinations.

§ 1818

(b) Cease-and-desist proceedings.

(1) If, in the opinion of the appropriate Federal banking agency, any insured bank or bank which has insured deposits is engaging or has engaged, or the agency has reasonable cause to believe that the bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank, or any written agreement entered into with the agency, the agency may issue and serve upon the bank a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearng will be held to determine whether an order to cease and desist therefrom should issue against the bank. Such hearing shall be fixed for a date not earlier than

thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of the bank. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank and its directors, officers, employees, and agents to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein) and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(c) Temporary cease-and-desist orders.

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notices of charges served upon the bank pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or substantial dis-

sipation of assets or earnings of the bank, or is likely to otherwise seriously prejudice the interests of its depositors, the agency may issue a temporary order requiring the bank to cease and desist from any such violation or practice. Such order shall become effective upon service upon the bank and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the bank, until the effective date of any such order.

(2) Within ten days after the bank concerned has been served with a temporary cease-and-desist order, the bank may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the bank under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(d) Same; enforcement.

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is

located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

(e) Suspension or removal of director or officer.

(1) Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured State bank (other than a District bank) has committed any violation of law, rule, or regulation, or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and the agency determines that the bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, the agency may serve upon such director or officer a written notice of its intentions to remove him from office.

(2) Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national banking association or a District bank has committed any violation of law, rule, or regulation, or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and the Comptroller determines that the bank has suffered or will probably

suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, the Comptroller of the Currency may certify the facts to the Board of Governors of the Federal Reserve System.

(3) Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured State bank (other than a District bank) by conduct or practice with respect to another insured bank or other business institution which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and unfitness to continue as a director or officer and, whenever, in the opinion of the appropriate Federal banking agency, any other person participating in the conduct of the affairs of an insured State bank (other than a District bank), by conduct or practice with respect to such bank or other insured bank or other business institution which resulted in substantial financial loss or other damage, has evidenced his personal dshonesty and unfitness to participate in the conduct of the affairs of such insured bank, the agency may serve upon such director, officer, or other person a written notice of its intention to remove him from office and/or to prohibit his further participation in any manner in the conduct of the affairs of the bank.

(4) Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national banking association or a District bank, by conduct or practice with respect to another insured bank or other business institution which resulted in substantial financal loss or other damage, has evidenced

his personal dishonesty and unfitness to continue as a director or officer and, whenever, in the opinion of the Comptroller, any other person participating in the conduct of the affairs of a national banking association or a District bank, by conduct or practice with respect to such bank or other insured bank or other business institution which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and unfitness to participate in the conduct of the affairs of such bank, the Comptroller of the Currency may certify the facts to the Board of Governors of the Federal Reserve System.

(5) In respect to any director or officer of an insured State bank (other than a District bank) or any other person referred to in paragraph (1) or (3) of this subsection, the appropriate Federal banking agency may, if it deems it necessary for the protection of the bank or the interests of its depositors, by written notice to such effect served upon such director, officer, or other person, suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the bank. Such suspension and/or prohibition shall become effective upon service of such notice and, unless stayed by a court in proceedings authorized by subsection (f) of this section, shall remain in effect pending the completion of the administrative proceedings pursuant to the notice served under paragraph (1) or (3) of this subsection and until such time as the agency shall dismiss the charges specified in such notice, or, if an order of removal and/or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the bank of which he is a director or officer or in the conduct of whose affairs he has participated.

(6) In respect to any director or officer of a national banking association or a District bank, or any other person referred to in paragraph (2) or (4) of this subsection, the Comptroller of the Currency may, if he deems it necessary for the protection of the bank or the interests of its depositors that such director or officer be suspended from office or prohibited from further participation in any manner in the conduct of the affairs of the bank, certify the facts to the Board of Governors of the Federal Reserve System.

(7) In the case of a certification to the Board of Governors of the Federal Reserve System under paragraph (2) or (4) of this subsection, the Board may serve upon the director, officer, or other person involved, a written notice of its intention to remove him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the bank. In the case of a certification to the Board of Governors of the Federal Reserve System under paragraph (6) of this subsection, the Board may by written notice to such effect served upon such director, officer, or other person, suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the bank. Such suspension and/or prohibition shall become effective upon service of such notice and, unless stayed by a court in proceedings authorized by subsection (f) of this section, shall remain in effect pending the completion of the administrative proceedings pursuant to the notice served under the first sentence of this paragraph and until such time as the Board shall dismiss the charges specified in such notice, or, if an order of removal and/or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the bank of which he is a

director or officer or in the conduct of whose affairs he has participated. For the purposes of this paragraph and paragraph (8) of this subsection, the Comptroller of the Currency shall be entitled in any case involving a national bank or a District bank to sit as a member of the Board of Governors of the Federal Reserve System and to participate in its deliberations on any such case and to vote thereon in all respects as a member of such Board.

(8) A notice of intention to remove a director, officer, or other person from office and/or to prohibit his participation in the conduct of the affairs of an insured bank, shall contain a statement of the facts constituting grounds therefore, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by the agency at the request of (A) such director or officer or other person, and for good cause shown, or (B) the Attorney General of the United States. Unless such director, officer, or other person shall appear at the hearing in person or by a duly authorized representative, he shall be deemed to have consented to the issuance of an order of such removal and/or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice has been established, the agency may issue such orders of suspension or removal from office, and/or prohibition from participation in the conduct of the affairs of the bank, as it may deem appropriate. Any such order shall become effective at the expiration of thirty days after service upon such bank and the director, officer, or other person concerned (except in the case of an order issued upon consent, which shall become effective at the time specified

therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(f) Same; stay of suspension and/or prohibition.

Within ten days after any director, officer, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured bank under subsection (e)(5) or (e)(7) of this section, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subsection (e)(1), (e)(3), or (e)(7) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

(g) Suspension or removal of director or officer charged with felony.

(1) Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a felony involving dishonesty or breach of trust, the appropriate Federal banking agency may, by written notice served upon such director, officer, or other person suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such

suspension and/or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such offense is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the agency may issue and serve upon such director, officer, or other person an order removing him from office and/or prohibiting him from further participation in any manner in the conduct of the affairs of the bank expect with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office and/or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), (3), (4), or (7) of subsection (e) of this section.

(2) If at any time, because of the suspension of one or more directors pursuant to this section, there shall be on the board of directors of a national bank less than a quorum of directors not so suspended, all powers and functions vested in or exercisable by such board shall vest in and be exercisable by the director or directors on the board not so suspended, until such time as there be a quorum of the board of directors. In the event all of the directors of a national bank are suspended pursuant to this section, the Comptroller of the Currency shall appoint persons to serve temporarily as directors in their place and stead pending the termination of such suspensions, or until such time as those who have been suspended, cease to be directors of the bank and their respective successors take office.

The pertinent part of 28 U.S.C. § 1491 (1971) provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

No. 76-1535

Supreme Court, U. S.
FILED
AUG 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

CURVIN J. TRONE, JR., TRUSTEE FOR WESTGATE-CALIFORNIA CORPORATION, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners brought this action in the United States Court of Claims, seeking compensation under the Tucker Act, 28 U.S.C. 1491, for what they claim was a taking by the Comptroller of the Currency of certain assets of Westgate-California Corporation and its subsidiaries (also known as the "Westgate Corporations") (Pet. 5). The alleged taking resulted from efforts by the Comptroller to require United States National Bank ("the Bank") to comply with applicable banking statutes by collecting or securing its excessive and illegal loans to the Westgate Corporations and others (Pet. 3-4).

In 1972 and 1973, during the course of regular examinations of the Bank, employees of the Comptroller found that the Bank had made numerous loans of questionable

credit-worthiness to Westgate-California Corporation and related companies amounting to more than 400% of the capital of the Bank (P. paras. 20-28),[1] far in excess of the amount allowed under 12 U.S.C. 84 and 371c. Moreover, C. Arnholt Smith, who was the largest single stockholder of the Bank and controlled it, also owned the majority of the stock of and controlled the Westgate Corporations (P. paras. 14, 16). This made the Westgate companies probable affiliates of the Bank. See 12 U.S.C. 221a (b). All loans to affiliates must be secured (12 U.S.C. 371c), but few if any of the loans to the Westgate Corporations were secured.

The loans from the Bank to the Westgate Corporations so overextended the Bank that, in May 1973, the Comptroller was forced to issue a cease and desist order, consented to by the Bank and by Smith (P. para. 37). Under that order, Smith resigned from the Bank but agreed to indemnify the Bank for any losses it sustained as a result of any loans or other extensions of credit to himself, the Westgate Corporations, and certain others, and to use his best efforts to collect or secure those loans to the Westgate Corporations then outstanding. A special committee of the Bank was appointed to oversee these efforts (P. para. 39). The Bank also agreed to document properly all credit files and perfect its interest in collateral as required by law.

After several months, it became clear that the Bank could not be saved simply by calling or securing the Westgate loans. At that point, the Bank was declared insolvent,

[1] "P" refers to the First Amended Petition filed by petitioners in the Court of Claims, a copy of which has been lodged with the Clerk of this Court.

and the Federal Deposit Insurance Corporation was appointed as receiver; it sold the Bank's "clean" assets to another California bank and proceeded to liquidate the rest of the assets (P. paras. 56, 57). Once the Bank failed, the Westgate Corporations had no source of financing and had to seek reorganization under Chapter X of the Bankruptcy Act, 58 Stat. 883 as amended, 11 U.S.C. 501 *et seq.* (Pet. 3). Petitioners are trustees in bankruptcy of the Westgate Corporations.[2]

Petitioners filed suit in the Court of Claims, claiming that the Comptroller's actions in forcing the Bank to collect or secure some of the loans to the Westgate Corporations constituted a taking of the property of the corporations (Pet. 5). Petitioners conceded that all acts performed by the Comptroller were legal and proper under the banking laws of the United States (Pet. 5).

The Court of Claims dismissed petitioners' suit (Pet. App. 1a-5a). The court held that the actions of the Comptroller did not constitute a taking but "fell well within the conventional ambit of bank regulation", since "[t]he Government simply caused the plaintiff companies to do what they should have been required to do by a properly-run bank" (Pet. App. 3a-4a). The Comptroller had merely tried to have the Bank, which had put the Westgate Corporations in an "improper preferential position", correct that situation (Pet. App. 4a). Thus, the court noted that unlike the potential eminent domain takings of private property underlying the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, on which petitioners

[2] As a result of his part in the Bank-Westgate dealings, Smith was convicted of various federal offenses in 1975.

primarily relied, this case involves only "governmental regulation correcting and redressing substandard and improper activities" (Pet. App. 5a).

Petitioners now claim that it was error for the Court of Claims to dismiss their petition without affording them an opportunity to present evidence showing that the Westgate Corporations are innocent of wrongdoing and cannot be charged with the "taint" of C. Arnholt Smith (Pet. 2, 8). Petitioners appear to believe (Pet. 6-8) that the court rejected their claims because the court charged them with Smith's wrongdoings.

Petitioners misread the Court of Claims' decision and misconstrue the applicable law. The decision of the Court of Claims did not turn on whether petitioners were innocent of wrong-doing. Rather, that decision is correctly grounded on a finding that the Comptroller's actions were not a taking requiring compensation to petitioners—whether those petitioners were innocent or not—but instead were "customary regulation by the banking authorities of a troubled bank in an attempt to put its affairs in correct order and to undo and untangle prior actions of the Bank which should not have been undertaken" (Pet. App. 3a).

The government in fact did not "take" any interest in petitioner's property for the public's use, but merely required the Bank to take certain action to comply with the law. Cf. *United States* v. *Central Eureka Mining Company*, 357 U.S. 155, 165-166. Further, the party suffering the alleged losses had a preexisting contractual duty to make most, if not all, of the payments, as part of various loan agreements; to the extent that obligations were already owed or were willingly incurred, no loss of property interest occurred on which a claim of taking could be based.

Finally, even if the Comptroller's actions with regard to the Bank and Smith were the direct cause of some diminution in value of petitioners' property that was not the result of preexisting legal obligations or of obligations willingly entered into, these actions were, as the court noted, taken pursuant to the Comptroller's regulatory powers. Petitioners' contention that the incidental impact on the affairs of the Westgate Corporations constituted a taking is clearly without merit.

As this Court has said, "[a] member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power" "'under which property rights may be cut down, and to that extent taken, without pay'." *Bowles* v. *Willingham*, 321 U.S. 503, 518. See also *United States* v. *Causby*, 328 U.S. 256; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393.

Since the court's finding that there had been no taking was equally correct regardless of the innocence of the creditors or the minority stockholders of the claimant companies, it was not error for the Court of Claims to grant summary judgment and thereby preclude petitioners from attempting to prove that they are not responsible for the actions of C. Arnholt Smith.[3]

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[3]As the Court of Claims noted (Pet. App. 4a), petitioners may have a claim against Smith for any injuries he caused them by taking illegal actions in the Westgate Corporations' names.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

DOJ-1977-08